

Sovereignty and Territoriality: An Essay in Medieval Political Theory

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Introduction

Today for many the idea of state sovereignty has become an empty shell. It portrays the state as a fixed territorial entity, but contemporary political practice, it is claimed, is neither static nor confined to territorial borders—it involves global capital, transnational citizen solidarities, and an emerging, at least in the developed world, transborder stratum of middle classes with congruent political interests. These new developments require new idioms—theories of globalisation, global civil society or economic interdependence—as opposed to antiquated theories of sovereignty. Yet, resisting this prevailing academic sentiment, the following pages contend that the idea of sovereignty has not exhausted its potential—it still illuminates past and present political practice.

Sovereignty, this essay argues, is first and foremost a claim about the supremacy of political authority, a claim that does not *per se* concern the issue of how such authority is linked to jurisdiction over land. Critics of the concept assume that sovereignty means ‘supreme authority within a given territory’ but this assumption is hard to defend. As the ensuing survey of the western medieval tradition will disclose, there is little in historical record that supports it. In actuality, post-sixteenth century Western Europe was *less* dependent on the idea of territorial jurisdiction than the Latin Christendom it was called to replace. The movement is from a more to a less territorially explicit legal order. If this view bears scrutiny, as it is suggested here, the current rise of political relations across territorial borders does not suffice to discredit the concept of sovereignty. This concept is not beyond criticism, but both its proponents and its critics need to examine it more carefully before venturing to debate the prospects of a post-sovereign international order.

To advance this task of conceptual clarification, my essay offers an excursus into medieval political theory. It argues that sovereignty, as the idea is used at present, has its genesis in a theological concept—it the notion of highest authority the archetype for which is God. But why invoke the medieval tradition to talk about all this? Three reasons can be pointed out. One is that the goal is to discuss sovereignty in theological terms and theology is a discourse of the Middle Ages. Secondly, fidelity to history is a consideration. It was in the epoch between the twelfth and fourteenth centuries that princes began to assert their supreme prerogative against the emperor and notably against the pope, culminating in the famous quarrel between Philip IV, the Fair, of France

and Pope Boniface VIII. Thirdly, the Dark Ages were the time of feudal relations, as characteristically land-based relations. To determine whether sovereignty is, at bottom, territorial concept or not, we have to attend to the tradition of feudalism.

The discussion that ensues is a theoretical sketch with a historical illustration covering the medieval era between 800AD and 1500s. It proceeds in three sections. The first explores the contestation for supreme political authority between popes and emperors, the rise of theological notion of sovereign authority and the subsequent articulation of a legalist or modern idea of sovereignty. The second examines the question of land jurisdiction and its link to sovereign authority. It looks at the feudal law of Western Europe in two of its largest kingdoms—Germany and Britain (although France is considered tangentially), in the crucial epoch between the twelfth and the fourteenth centuries. The third section is devoted to *ius commune* (common law) as an idiom that contributed to the transformation of the multiplicity of feudal political entities—duchies, principalities, kingdoms—into an international order of uniform units: sovereign states.

I. Sovereign Authority: Popes, Princes, Emperors

In the high Middle Ages, the Holy Roman Empire and the papacy contested the claim to represent the ultimate authority in Latin Christendom.¹ The bone of contention concerned the question of law. But why we may wonder? Medieval society constituted an amalgam of social relations: military, political, economic, trade, religious,² where law was the apex. In the words of Walter Ullmann, 'It is no exaggeration to say that the law has at no other time played such a pivotal role in society as in the Middle Ages'.³ But this was so because law was seen as a source of legitimacy or 'right'. The contest over who commands the *highest* authority was de facto a struggle for holding *right* authority, one that is proper, legitimate or moral. In medieval times the expectation of the law in short was that it reflected moral ideals—as reflected in St. Augustine's dictum that 'unjust law is not law'.

¹ Walter Ullmann, *Principles of Government and Politics in the Middle Age* (London: Butler and Tanner, 1961).

² Marc Bloch, *Feudal Society*, trans. from the French M. M. Postan, 2 vols (London: Routledge, 1961), vol. 2, chs 21-26, 32.

³ Walter Ullmann, *Law and Politics in the Middle Age: The Sources of History* (London: Western Printing 1975), p. 29.

The idea that princes do not simply rule but do so legitimately, or by right, is recurrent in the history of Western political thought. When the earliest systematic commentator in the English common law tradition, Henri Bracton, wrote in the twelfth century: ‘a prince rules either by force or by law,’⁴ he meant that law is not merely coercion but *legitimate* coercion. Rulers’ ability to justify their power, to demonstrate that it embodies right rather than sheer force, was pivotal for ensuring the continuity of political institutions. As later writers like Machiavelli understood all too well, almost anybody could usurp power but few could keep it— the conservation of political power demanded legitimacy.⁵

Medieval politics moreover was not neatly divided into distinct spheres of competence, rank, or office. It was marked by multiplicity: one and the same person could hold multiple titles, or different rulers—that is, persons of different social, religious and political status—can have pretensions for the same title. This is reflected in the vocabulary of the medieval tradition. ‘Prince’ for example was a word applied to nobles of high standing but also to the emperor and even the pope.⁶ Its meaning originated in Roman law: *princeps* (‘first governor’) or ‘Roman emperor’.⁷ To be prince meant to be ‘one who governs others but who obeys none’—or what today we call a sovereign ruler. And it was not simply barons and dukes, but also popes and emperors as well as prelates who disputed among themselves the title of prince or the right of sovereign power.

Sovereignty indeed has Roman law roots, traceable to the doctrine – *princeps legibus solutus est*, ‘the prince is not bound by the law’.⁸ It stipulates that rulers make the law but are not themselves bound by it. This idea, conveying the unlimited discretion of the Roman emperor to create legislation, acquired a new significance in the so-called Second Middle Ages (after 900 AD) when the power of the Catholic Church as an institution grew. After the classical Roman empire collapsed in the sixth century, German tribes— Visigoths, Ostrogoths, Burgundians, Franks, Frisians, Saxons, Lombards—took over its

⁴ Henri Bracton, *Bracton on the Laws and Customs of England*, ed. S.E. Thorne and G.E. Woodbine (Cambridge, Mass., 1968), vol. 2, p. 9.

⁵ Niccolo Machiavelli, *The Prince*, tr. George Bull (London: Penguin, 1961), ch. 24.

⁶ Benjamin Arnold, *Princes and Territories in Medieval Germany* (Cambridge: Cambridge University Press, 1991), p. 15.

⁷ Brian Tierney, ‘“The Prince is not Bound by the Law”: Accurcius and the Origins of the Modern State’, *Comparative Studies in Society and History*, vol. 5 (1962), pp. 378-400; Kenneth Pennington, *The Prince and the Law 1200-1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley: California University Press, 1993), pp. 90-91, 276.

⁸ The maxim: ‘*princeps legibus solutus est*’ is found in Justinian’s *Corpus Iuris*, Dig. 1.3. 31; See also Pennington, *The Prince and the Law 1200-1600*, pp. 77-90.

territories, thereby initiating an era of tribal interregnum. Perhaps the need to curb the resultant anarchy led to the reconstitution of the empire:⁹ for a very short time, as Carolingian (Frankish) empire in the second half of the eighth century, and afterwards, under emperor Otto I (962) as Holy Roman empire, turning into a 'German' empire in the thirteenth century.¹⁰ But this new empire composed of Teutonic warriors faced a formidable competitor in the face of the Church, the only surviving institution of the shattered classical Roman world.

In the classical Roman empire, the emperor was supreme in civil matters but also in ecclesiastical ones—he legislated freely on religious questions, over the head of the pope.¹¹ Imperial power was 'absolute' and the papacy could not dream to challenge it. But the situation changed when Germanic tribes stepped in to fill the institutional void left by the disappearance of *Pax Romana*. Having accepted Catholicism around 800AD, these Teutonic princes and their kings recognised the spiritual authority of the pope.¹² This accounts for the traditionally strong connection between lay princely power and ecclesiastical princes (bishops and archbishops) in Germany in medieval times.¹³ After Teutonic peoples united into the new Carolingian empire and subsequently into the German empire, the German emperor initially commanded significant power vis-à-vis the pope, since, as before, and under the classical Roman principle, papal coronation was part of the ceremony for accession to the emperor's throne. But after the crisis of a weak papacy during the ninth and tenth centuries ended, the balance of power came to favour the Holy See. Popes started to interfere in politics as lay rulers. The pope for example began to demand, and on occasion was successful, the right to nominate candidates for the imperial election and finally, even to depose emperors.

The papacy became particularly strong in the eleventh century, after pope Gregory VII won the so-called Investiture Struggle against the German emperor.¹⁴ Before the Gregorian Reform, the emperor could invest (hence the term 'investiture') bishops or

⁹ Arnold, *Princes and Territories in Medieval Germany*, chs. 1-2.

¹⁰ Caenegem, *An Historical Introduction to Western Constitutional Law* (Cambridge: Cambridge University Press, 1995), pp. 43, 63-65.

¹¹ Edward Jenks, *Law and Politics in the Middle Ages* (London: Murray, 1919), p. 18.

¹² Jenks, *Law and Politics in the Middle Ages*, pp. 27-28; Caenegem, *An Historical Introduction to Western Constitutional Law*, p. 37.

¹³ Caenegem, *An Historical Introduction to Western Constitutional Law*, p. 37.

¹⁴ For a comprehensive overview of the Investiture Struggle see James Westfall Thompson, *Feudal Germany* (Chicago: University of Chicago Press, 1928), ch. 3, pp. 125-166.

archbishops with jurisdictional rights over a piece of territory or church (*diocese* or *archdiocese*). The ceremony of investiture was part of the grant of bishoprics, making the bishops feudal vassals or holders of imperial lands, thereby drawing them into the sphere of the emperor's political and legal prerogative. In Germany, unlike Britain, ecclesiastics could be vassals or land-holders.¹⁵ (This is one reason why feudalism as a system of land-law, and especially the contrast between German and British feudal doctrines, has relevance for the question of supreme political authority in the Middle Ages—a theme taken up in section II.) To prevail in the Investiture Struggle, the Church used to its favour the tension between noble and powerful bishops and archbishops who supported the empire, and ordinary monks and monasteries loyal to the Holy See. Eventually the Gregorian reform promulgated that only ecclesiastical officers can invest clerics with ecclesiastical powers.¹⁶ On one interpretation, this established the autonomy of the Church from the secular world of politics, as expressed by the two swords doctrine—with the Vicar of Christ holding the spiritual sword and the emperor, the temporal sword.¹⁷

However, a stronger interpretation is also possible to the effect that the Gregorian reform enabled the papacy to claim supreme authority over the whole institutional edifice of the Catholic Church. After the papal curia conquered the Church—after frustrated attempts by the so-called conciliar movement to oppose the theocracy of the popes by 'democratic' conventions such as ecclesiastical councils failed¹⁸—it embarked on a conquest of the entire political realm of Western Europe. By asserting its prerogative over the totality of the spiritual world—in every point on the map of Latin Christendom—the pope implicitly sought to exercise such authority over the terrestrial world. God's grace—the final source of authorisation in the Middle Ages—entitled the pope to govern in spiritual but also, and this was crucial, in worldly matters. The rationale for this was relatively straightforward: as the principle of sovereign authority stemmed from God, only rulers who had God on their side could claim sovereignty.

¹⁵ For the argument that in the German empire prelates could be 'ecclesiastical princes' or land-holders see Arnold, *Princes and Territories in Medieval Germany*, chs.1, 4. For the absence of this practice in Medieval Britain see Jenks, *Law and Politics in the Middle Ages*, p. 26.

¹⁶ See Giorgio Falco, *The Holy Roman Empire: A Historical Profile of the Middle Ages*, trans. K. V. Kent (London: Allen and Unwin, 1964), p. 190.

¹⁷ Caenegem, *An Historical Introduction to Western Constitutional Law*, p. 86-87.

¹⁸ Brian Tierney, *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism* (Cambridge: Cambridge University Press, 1955).

To oppose papal pre-eminence, princes had to make a similar counter-bid: the well-known doctrine of the 'divine right of kings'.¹⁹ It contended that the lay princes' right to rule stems directly from heaven, and that political authority is not mediated by the Vicar of Christ on earth. But because the justification of princely prerogative was still God, arguments for sovereignty continued to gravitate into the orbit of theological language. Princes could perhaps evade the direct papal interference into their political affairs but not the pervasive influence of theology and the Church.²⁰ Theological notions such as the divine right thesis, developed in the fourteenth century, circulated in the political discourse of Europe for another three hundred years until they were questioned by Hobbes and Locke.

The idea of sovereignty then has two traditions—the Roman and the theological. It is important to appreciate the contrast between these. In ancient Rome, the emperor himself was the fountain of the highest prerogative and for this reason, *legibus solutus* ('above the law'). Once it was authorised by the people, imperial authority no longer needed a sanction from a higher source. Sovereignty was fully self-legitimising.²¹ Yet, in the Middle Ages sovereignty turned into a different, theological concept—it was ultimate authority because it had an ultimate source outside itself: God. 'Ultimate', once again, meant 'moral', 'right', 'proper', 'legitimate', and therefore, 'the highest'. For the medieval mind, authority, be it in ecclesiastical or political, had to recognise moral bounds—it could not be unlimited or absolute as in the Roman tradition.

But as Hobbes realised, sovereign authority must be self-legitimising to be logically complete. The state that claims to be sovereign cannot await for its authority to be legitimised by God—instead it should be its own God. Hobbesian theory in effect redefines the concept of sovereignty in terms of autonomy. 'To be sovereign' comes to mean 'to be independent from other authorities' and, by virtue of this independence, 'to be the highest authority in a given realm'. This notion of sovereignty is complete for it does not require an outer source to provide it with moral justification. This completeness surely comes at a price—since sovereignty is now a strictly legalist concept—which has

¹⁹ N. Figgis, *The Theory of the Divine Right of Kings* (Cambridge: Cambridge University Press, 1896).

²⁰ See Figgis, *The Theory of the Divine Right of Kings*, pp. 11-13.

²¹ But it is not crude power—it is authority. 'Authority, or in Roman term 'auctoritas', presupposes authorisation or author (such as the demos). See Michael Oakeshott, *Lectures in the History of Political Theory*, ed. Luke O'Sullivan and Terry Nardin (Exeter: Imprint Academic, 2006), p. 195.

lost its moral force. The sovereign state is a *legal* realm, not a *moral* community. Law is separated from morality, a distinction that is nowhere to be found in medieval doctrine. It is a modern distinction of Roman roots.

For Hobbes further, the state is a *res publica* or a public realm of law, a term imported from Roman law.²² Thus, in the public or legal domain (*'in foro externo'*), the citizen must not interfere coercively with the pursuits of other citizens, but is free to enjoy in the confines of one's moral consciousness (*'in foro interno'*) any conceivable moral ideal.²³ Despite the dreaded restrictions imposed on the individual by the state, this formula opens up unprecedented possibilities for individual freedom and coexistence of divergent moralities within the perimeter of the state.

Applied to the international scene, this logic gives rise to an international public realm where states can coexist by accepting the 'live and let live' moral principle. The most apt illustration is the Peace of Augsburg (1555), where the warring parties accepted the formula *'cuius region, eius religio'*: ('to each realm its own religion') which is a reformulation of the principle 'each ruler is emperor in his realm'. This assigned morality and religious conviction to the private sphere of each individual state, while a set of legal rules constituted the public sphere common to all states. For medieval theory and practice shows that as long as claims to sovereign rule have moral character—or are claims about right and wrong, about legitimacy and justice—the political contestation between princes can reach no resting place. At Augsburg, the Roman principle that the emperor is supreme in his realm was translated into the doctrine of a public realm between states. Yet this fact of a multiplicity of states is a far cry from the unitary structure of the Roman empire.

Modern post-sixteenth century Europe then has adopted the Roman heritage but not uncritically, and even less so fully, because the context has changed—it includes new agents, labouring within the constraints of new historical contingencies, and crucially, new political theory. For while for the Roman lawyer, 'the emperor is supreme in his realm' is a declaration of the emperor's supreme legislative authority within a single

²² For example, one definition is: '*Res* is the general name for anything which is the object of a legal act'. William Smith, *A Dictionary of Greek and Roman Antiquities* (London: John Murray, 1875), p. 421.

²³ Hobbes, *Leviathan*, ch. 15, p. 215.

hierarchical political order or empire, the modern reading of this principle invokes a horizontal political order—system of sovereign states. This is a stark difference, revealed in the Hobbesian idea of sovereign authority as nominal independence of one agent who is bound or checked by other similarly independent agents. Hobbes thereby has introduced an innovation into political theory by departing from the Roman ideal of imperial power but also from the medieval canon of theology. As he writes, although sovereign authority is ultimate it is not unbound; and it is ultimate not because it derives from God but because it resides in an autonomous (self-legislating) agent—the state.²⁴

The modern sovereign state as a result replaces the idea of sovereign God, thereby creating the sovereign citizen who resides within such a state. Political authority does not demand any more a recourse to some higher source for its justification such as the doctrine of divine right of kings. In his attack on Filmer, an arid proponent of this doctrine, Locke is now able to write that sovereignty is not authorised from above, from heaven, but from below, from the demos.²⁵ In modern political theory, sovereignty, regardless of whether it is princely or popular, has become the defining feature of statehood—the primary cause or unmoved mover in the political universe of government.

II. Land, Territoriality, Feudalism

At this point we arrive at the second central theme of this essay—sovereignty authority and its relation to jurisdiction over land. Is sovereignty a territorial concept, as most of IR scholarship claims? A fresh re-start of the themes discussed so far is requisite to address this puzzle. Let us go back to Europe of the twelfth century, and examine the world of feudal or land-based legal relations.

A glance on the map of medieval Europe of the said period would reveal immense fragmentation: a mosaic of duchies, bishoprics, free cities, principalities and kingdoms.

²⁴ Thomas Hobbes, *Leviathan*, ed. C. B. Macpherson (Penguin, 1968 [1651]), ch. 16.

²⁵ C. B. Macpherson, 'Introduction', John Locke, *Second Treatise of Government*, ed. C. B. Macpherson (Indianapolis: Hackett, 1980 [1690]), p. vii.; Walter Ullmann, *Principles of Government and Politics in the Middle Ages*, pp. 232-279; Otto Gierke, *Political Theory in the Middle Age*, tr. with an introd. Frederic W. Maitland (Cambridge: Cambridge University Press, 1900), on popular sovereignty pp. 37-48; and on modern sovereignty, pp. 92-94.

This fragmentation was allegedly a product of feudalism. Historians use this term—in many respect an unfortunate and eclectic term²⁶—to describe the bond between lords and vassals (and serfs) as mediated by land. Specifically, the feudal lord granted a piece of land or fief against which the vassals were supposed to provide *auxilia* ('support') and *concilia* ('counsel'). The support covered military aid as well as pecuniary aid, to relieve the lord from heavy financial burdens such as marrying off his daughter. The counsel included the vassals' obligation to sit in the lord's court as judges,²⁷ leading Edward Jenks to say: 'feudal law is essentially a law of courts'.²⁸ But in utmost simplified terms, the feudal bond can be said to consist of two elements: land ownership and military service. It was an exchange of land for respect and support in war. When war broke out, which in the Middle Ages was an almost permanent state of affairs, the vassals were dispatched as knights to fight for their prince.

While conventions such as oaths, the code of knightly honour, were important ingredients in the system of feudal relations, its central element was the system of land holding. Upon pledging fealty and homage to the lord, the vassal received a fief together with the resident peasants or serfs attached to it. Since they had limited rights, serfs were considered non-free servants as opposed to slaves.²⁹ The fief constituted a right of usage, and strictly speaking the vassals were *tenants*, not owners. Initially—or starting around the ninth century—fiefs were granted for life and upon the vassal's death reverted to the overlord. Gradually they became heritable, and even women who in the Middle Ages did not bear arms were allowed to be vassals. But inheritance was not automatic—it was not a legal right—as the new tenant was supposed to pay tax or 'relief' to the feudal *seigneur* and the latter was to endorse the right of the tenant to hold the land in question. Similarly, while in the beginning one could be a tenant to a single lord only, practice changed to allow for multiple overlords. And subtenancy of the same fief was in general allowed, in the sense that if B held land of A, C could held of B and so on. This stimulated territorial fragmentation as well as conflicts of allegiance, in case a vassal was called to participate militarily in a conflict between two of his overlords.

²⁶ Francis Oakley, *The Medieval Experience* (Toronto: Toronto University Press, 1993), p. 115.

²⁷ While Maitland spoke of the right of vassals to sit on the overlord's court as a *burden*, Jenks referred to this as a cherished *privilege*, which brought its holder fees and fines. See Frederic Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1908), p. 62; Jenks, *Law and Government in the Middle Ages*, p. 24.

²⁸ Jenks, *Law and Government in the Middle Ages*, p. 25.

²⁹ Slaves were treated like 'objects' or 'things', while serfs were *persons* or right holders. Maitland, *The Constitutional History of England*, p. 33.

Yet, the features of feudalism vary depending on the country and the age. Here the example of medieval Germany and Britain between the twelfth and the fourteenth centuries is sketched out. Germany is a crucial case because it is there, under the Carolingian empire, that feudalism emerged as a system of land relations.³⁰ And the contrast between the two countries matters, as it throws light on the question of how supreme political authority in Western Europe in the Second Middle Ages (1200-1500s) evolved at the institutional background of land holding and land ownership, eventually producing a particular spatial and political distribution—an international system of sovereign states.

German feudalism exhibits two peculiarities—one linked to the position of ecclesiastics in the feudal system, and one to the relationship between the king and powerful local landowners. In Germany, top clerics (bishops, archbishops) in addition to lay nobility (dukes, counts and barons) could hold fiefs from the king. As noted already, the Investiture Struggle in the eleventh century had its particular ramifications precisely because German ecclesiastics could hold fiefs, a practice that was prohibited in Britain. Land was also a key problem in the conflict between the German emperor and the Holy See because the Church was itself a massive landowner with vested interests.³¹

The second peculiarity of medieval Germany is its large number of independent landowners (not *landholders* or tenants). Such nobles had their own land—historians term it ‘allodial’. Allodial land was not part of the royal fiefs but was acquired through dynastic inheritance or direct purchase. Dynasties or family ties thus acted as a counterforce to the bondage of land that tied lord to vassals. Powerful aristocrats who had their own land could in principle oppose the king, since they were not forced to be king’s tenants with respect to the royal land. However, feudal bondage can work in indirect ways. For example most aristocrats could have their status changed by the German king and this procedure would also change the status of the land they owned. If a prince was elevated into a duke, with dukes standing next in kin to the royal family, then the prince’s formerly independent land, the duchy, became part of the royal fief and the king can from then on confiscate it as a penalty. Such a pretext was often an ill-concealed attempt to get rid of a former favourite but it was not totally arbitrary—the

³⁰ Caenegem, *An Historical Introduction to Western Constitutional Law*, p. 48.

³¹ Thompson, *Feudal Germany*, p. 127.

idea that a prince can receive justice by mediation of his peers and in the court of his opponent, the king, is a distinctively medieval idea.

Yet, despite that medieval Germany was feudal in all too many respects, there are two reasons as to why the relationship between German emperor and his princes were not completely 'feudal'. First, while military duty bounded German princes to the emperor, as it did all vassals elsewhere, the princes—and this is noteworthy—held the right to elect the emperor.³² Instead of enjoying the typical feudal right of *concilia*, allowing them to be judges on the bench of the king's court, they also had the power to *choose* the emperor—not all princes of course but a dozen of 'princes –electors'. The fact of such influential princes, coupled with the elective character of the German empire, helps us understand how it was possible to reach subsequent arrangements of sovereign independence within the framework of the German empire at Augsburg (1555) and Westphalia (1648).

Secondly, within the German empire, the feudal relations between lords and vassals were primarily about *authority* and only then, about land.³³ To express the same idea differently: the augmentation of regional princely power, including the gradual consolidation of lands into enclosed and continuous geographical segments—precursors of modern territorial states—by powerful German dukes and counts in the two centuries preceding Augsburg's treaty, was not an exercise of power over territory. It was an exercise of jurisdiction over *persons*. It concerned the power of princes to command the right of capital punishment over entire social orders or classes.³⁴ This right over 'life and limb' pertained to all the people who happened to live on the prince's land and regardless of whether or not they were attached to the fief or another lord.³⁵ This definition of power over life and death strikes a familiar cord—in the later writings of Jean Bodin and Hobbes it will be called 'sovereign power' or sovereignty.

Although feudalism was a system of land relations, the peculiarities of the German empire produced forces that worked towards the articulation of political authority that is independent from such relations. As a precursor of modern politics, the right over life and death—or sovereignty—replaced the feudal concern with rights over land. Had

³² Arnold, *Princes and Territories in Medieval Germany*, p. 25-28.

³³ Arnold, *Princes and Territories in Medieval Germany*, pp. 191-193.

³⁴ Arnold, *Princes and Territories in Medieval Germany*, p. 37.

³⁵ Arnold, *Princes and Territories in Medieval Germany*, pp. 212-213.

France or Britain been the largest empire of Latin Christendom, the tale of sovereign states might not have been a plausible interpretation of the transition from medieval towards modern political experience.

This argument obliges a brief review of parallel feudal developments in Britain and France. Feudalism was introduced in Britain by the Norman conquest of 1066.³⁶ Because the existing legal system at that time was underdeveloped, the conquest permitted the introduction of a new set of uniform legal principles—a feudal legal system—whose first principle was that ‘all land belongs to the king’.³⁷ This feudal doctrine was given additional impetus after the (ecclesiastic) law, permitting the inheritance of land through will, was abolished, and when the law of primogeniture was introduced, permitting only the transfer of undivided land to a single heir. Feudalism of this sort had Teutonic or Scandinavian origins but it was refined and perfected by the Norman legal mind. The principle that all land in Britain is, in the last resort, owned by the crown meant two things. First, that British nobles would be direct vassals to the king. Secondly, that as vassals they have an overriding obligation (*auxilia*) to fight for the king. Since subtenancy was legally permitted until 1290,³⁸ this required a prince, who was simultaneously a vassal of another prince, to support militarily *the king* against his immediate overlord. In contrast, in France the vassal would have the obligation to support his immediate lord *against* the king.³⁹ As the French much like the German aristocracy included tenants to the royal fiefs, but also a large group of independent landowners, the French crown was quite weak against the local counts and dukes. To illustrate the strength of French nobility it suffices to note that William the Conqueror was Duke of Normandy—under the French jurisdiction—aside from being King of Britain. The power of local nobles perhaps accounts as to why feudal France was territorially fragmented. But in Britain, because of the immense power of the king, feudalism tended to produce centralisation rather than fragmentation.⁴⁰

³⁶ Maitland, *The Constitutional History of England*, p. 155.

³⁷ Jenks, *Law and Politics in the Middle Ages*, p. 35; Maitland, *The Constitutional History of England*, p. 155.

³⁸ Maitland, *The Constitutional History of England*, p. 29.

³⁹ Maitland, *The Constitutional History of England*, p. 162.

⁴⁰ Caenegem, *An Historical Introduction to Western Constitutional Law*, p. 53.

It would appear that Britain was the most feudal legal system during the Second Middle Ages. But as renowned nineteenth-century commentators of legal history, Maitland and Pollock write, the English legal system even around 1800s can be termed the 'law of the land'. Yet, this fact does not make Britain medieval.⁴¹ If we accept the restricted definition of feudalism as a relationship of *land-tenure* which is a public rather than private legal relationship as Maitland argues, Britain would be the least feudal of all kingdoms in medieval Europe. Thus he argues, there were agencies that opposed the full-fledged development of feudalism as it is understood in continental legal and political tradition. For example, since British practice prevented priests from holding fiefs, Canon Law was an independent source of law aside from feudal law.⁴² Apart from this, ancient legal customs from times preceding the Norman Conquest had survived—such as the laws of the county. They concerned land and territorial jurisdiction but were *unrelated* to feudal land tenure. Further, Britain had a national army, in addition to the feudal army of knights, who as vassals were expected to support the crown militarily. Last but not least, the jurisdiction of the king's court was *not* feudal in character—that is, there were no vassals who could make pronouncements about the royal decision on a particular matter. While the feudal court was court of peers, the king's court (or rather courts) in Britain—could override the local jurisdiction of other courts. In the thirteenth century the power of the English king thus was immensely larger than that of the German emperor or the French king.⁴³

It comes as little surprise that the British monarchy would be the cradle of absolute sovereignty in political practice, as well as in political theory—as theorised by Hobbes. Despite that the introduction of feudalism in Britain by an external shock, the Conquest, made the feudal idiom of land-tenure an extremely potent driving element for law and society, the king's courts was eventually able to counterbalance it. The sovereign prerogative of the British monarch developed against, not within the framework of this idiom. This indicates that the question of holding land, while not unimportant, is secondary, while the question of who has the exclusive right to determine the status of such land is primary. This latter issue is one about supreme authority.

⁴¹ Maitland, *The Constitutional History of England*, pp. 154-155. Frederick Pollock, *The Land Laws* (New York: Macmillan, 1896), pp. 1-18.

⁴² Jenks, *Law and Politics in the Middle Ages*, pp. 26-27.

⁴³ Jenks, *Law and Politics in the Middle Ages*, pp. 41, 55.

III. *Ius Commune* and Political Theory

Yet, two sets of troubling questions remain: (1) Is monarchy a necessary condition for the emergence of sovereignty? (2) If in the British example all the land was symbolically unified into a common royal realm, how did the multiplicity of independent cities, duchies and principalities composing the territory of the French and German kingdoms transform into uniform political entities such as 'France' and 'Germany'? A detailed investigation of these questions must be postponed for another occasion. Relevant here are two provisional, and admittedly very general, answers. With respect to the first question, we can observe that sovereignty is linked to the notion of a modern sovereign state, irrespective of its substantive principle of political organisation—be it kingdom, republic, or constitutional monarchy. So of interest are solely the formal properties of the state. With respect to the second question, we are inquiring into the centralising forces in medieval Europe that affected a profound change—from a territorially fragmented world into an ordered sphere of sovereign states.⁴⁴

To achieve such a transformation a centralising impetus is necessary. Furthermore, two aspects of centralisation should be distinguished—one that works bottom-up, integrating previously diverse territorial jurisdictions into a unitary state; and one that works top-down, to produce institutional uniformity among a *group of states*. The first has a national scope, while the second is international. From the discussion so far we can infer that at a national level a centralising influence in Britain was kingship, while in France and Germany it was the power of independent local landowners: counts, bishops, and dukes. But while such national forces of unification were outgrowths of the feudal system in these particular counties, they tell us little about how and why it became possible to have an *international* system of states—animated by an identical formal principle of sovereignty. Since feudalism embodies local law and politics, it cannot account for the international dimension of this development. Alternative legal and political idioms must be sought.

⁴⁴ *Ius gentium* (international law) can be seen as an independent source but the issue is too complex to be discussed in the confines of such a short paper. Similarly, *lex mercatoria* (merchant's law) is another source but it occupies an analytical space between local law and international or universal law (such as *ius gentium* or Roman law). *Lex mercatoria* evolved as cities developed and urban relations began to replace the feudal system of primarily agricultural rural relations—a development that influenced the spread of the Italian city-states.

Indeed, parallel to feudal law, there were other legal traditions from which genuinely international as opposed to local practices can emerge. The key among this is common law (*ius commune*). But this term here denotes the continental legal tradition (comprising Roman law and canon law), not the British tradition which under the same label designates the law of the land, as governed by supreme royal jurisdiction.⁴⁵ The British 'common law' is centralising solely with respect to the British kingdom. It can integrate the diverse jurisdictions of one particular kingdom into a unitary state, but it cannot further produce a system comprising a plurality of such states. Since feudal law is specific to a particular country—this elucidates the point as to why the British common law cannot liberate itself completely from the elements of feudal law (that is, of its character as land law).

The *ius commune* that merits our attention is a continental idiom—a law shared by different kingdoms—or a prototype of international law. Characteristically, this law is distinct from feudal law. One way of thinking about their relationship is to say that feudal law stands to *ius commune* as private law stands to public law.

Private law covers persons, and transactions between persons such as obligations (contracts), and things or property. But public law is harder to define. Roman legalists used the term but its meaning today is different since contemporary public law, unlike its Roman counterpart, includes criminal law.⁴⁶ Characteristically, in the Middle Ages the relations between persons were central to law since the notion of public realm was only imperfectly articulated—the kingdom itself was treated as private property, heritable by the prince's descendants and transferable in the games of dynastic politics. In medieval times, the distinction between public and private law was familiar only to the Roman lawyer.⁴⁷ The area of public law during this epoch remained largely uncharted—its moot sources were either Roman law or political theory.

But Roman law, together with canon law, presents the fundament of *ius commune*. So the revival of Romanisation—which took place in France and Italy after the eleventh century and much later in Germany but not in Britain—was a universalising vehicle that can impart a common legal spirit and thereby to arrest the feudal tendencies of local

⁴⁵ Jenks, *Law and Politics in the Middle Ages*, pp. 35-36.

⁴⁶ Caenegem, *An Historical Introduction to Western Constitutional Law*, p. 1.

⁴⁷ Caenegem, *An Historical Introduction to Western Constitutional Law*, p. 2.

fragmentation. But Roman law could bring the diversity of national customs and practices in Western Europe under a common body of principles because the classical Roman empire—*imperium mundi*—itself used to comprise the entire civilised humankind. Roman law has been a natural part of the French or Gallic cultural space. In Germany its rediscovery in the fifteenth century perhaps signalled an increased Italian intellectual influence, since from the reign of emperor Otto I onwards, the German empire included the Italian kingdoms and principalities.

Canon law in its turn was another universalising agency over the realm of medieval Europe because it was the universal law of the Church. It was superior to the laws regulating local churches. Its sources were papal law (especially decretal letters) and conciliar or synodal decrees.⁴⁸ The power to settle the ‘canon of Christian life’, wielded by the papacy since the fourth, and especially between the eleventh and thirteenth centuries, meant supreme authority over the entire spiritual realm of Latin Christendom. As noted previously, such a claim for ‘fullness of power’ in religious matters was a tacit license for seeking supreme authority in worldly affairs. Not without a reason, in their quest for sovereignty, as a political right commanded by lay princes, Philip the Fair and Henry VII revolted against the papacy, not against the German empire.

The issue of how canon law relates to Roman law is not an easy one. But perhaps we can agree with Kenneth Pennington’s argument that ‘to separate the two legal systems is artificial and even misleading. Both laws were taught in law schools throughout Christendom, students studied both laws as a part of their legal education, and the medieval jurisprudence can only be understood with a knowledge of each.’⁴⁹ This is a concealed way of admitting that church law was to a large extent influenced by Roman law—or by the canonical texts of Justinian’s code.

Returning to private-public law distinction, we can now attend to the question of how Roman lawyers understood it. Crucially, they juxtaposed the private law of persons with the public law between states.⁵⁰ This idea is important for two reasons.

⁴⁸ Ullmann, *Law and Politics in the Middle Ages*, p. 120.

⁴⁹ Kenneth Pennington, ‘Roman and Secular Law in the Middle Ages’, F.A.C. Mantello and A.G. Rigg (eds.), *Medieval Latin: An Introduction and Bibliographical Guide* (Washington, D.C.: Catholic University Press of America, 1996), pp. 254-266, p. 255.

⁵⁰ Reinhard Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1995), pp. 1-33.

First, it suggests that the notion of public realm or *res publica* is associated with the modern sovereign state. This state is not reducible to notions familiar from private law—persons, contacts, or property. It is not coextensive with the named person of a ruler—it is no longer possible to say like Louis XIV did: ‘L’etat c’est mois’ (I am the state). It is not the sum of contracts that its citizens have concluded among themselves. Nor can we derive its meaning from another concept of private law such as property, or *dominium*, since it would be odd to claim that the state *owns* the citizens. Instead, it only provides the framework for the transactions of persons—it embodies the legal system (law as such) rather than a bundle of specific rights, obligations or contracts attached to named persons. This is why it is inappropriate to read theories of the sovereign state under the category of property, and to argue that sovereignty settles the problem of property rights by enabling one agent to ‘exclude’ another from a given segment of territory.⁵¹ The state is an abstract *office*—a formal structure of powers and capacities—that *any* agent can occupy. And this is another way of pointing out that it is a public realm.

Secondly, and quite counterintuitively, the Roman tradition suggests that sovereignty—precisely because it is a formal, abstract or artificial relationship between agents—can be construed as a relationship between states rather than as a relationship between living individuals. This idea underpins the argument for a ‘state of nature’, advanced by Hobbes and Grotius.⁵² The sovereign state, as a public realm, makes possible the creation of an *international* public realm between such states. But this is an argument drawn from political theory not from the legal tradition. With this discussion has made full circle to where it began—with the question of sovereign authority.

Conclusion

It is time to bring this discussion to a close. The main thesis this essay sought to defend was that sovereignty is a claim about the supremacy of political authority, not a claim about how such authority is linked to jurisdiction over land or land-ownership. In the third section of the essay, devoted largely to the Roman tradition, as well as in the first

⁵¹ John G. Ruggie, ‘Territoriality and Beyond: Problematizing Modernity in International Relations,’ *International Organization*, vol. 47, no. 1 (1993), pp. 138-174.

⁵² Hugo Grotius, ‘Prolegomena’, in Hugonis Grotii [Hugo Grotius] *De Jure Belli et Pacis Libri Tres*, abridged trans. William Whewell, 3 vols (Cambridge: Cambridge University Press, 1853 [1646]), vol. I; Hobbes, *Leviathan*, chs. 14-15.

section focusing on theological doctrines, the concept of sovereignty was articulated *without* reference to territory or jurisdiction over land. This latter concern with land-holding and land-ownership characterised the epoch of feudalism. But as the preceding pages have hopefully shown, when the association of sovereign states began to emerge on the horizon of modern Europe, the system of feudal relations in the largest kingdoms, Germany, France, and Britain, was experiencing its irreversible eclipse.

Analytical clarity was imparted to the idea of sovereignty by emphasising that it pertains to the notion of authority as sanctioned 'from above', by either God or emperor. But as a careful reading of Roman law disclosed—this does not render it an autocratic concept. Sovereignty is authority that demands authorisation and that implies 'auctoritas' –or delegation of original authority by the governed. Further, the argument that law and therefore state practice is bound by moral limits was characteristic of the Middle Ages. Modern theories of sovereignty therefore can be viewed as a Roman invention, *mediated* by the medieval tradition, which tradition infuses them with the ideal of judicial interpretation or 'court by peers'—or with what in contemporary parlance is constitutional limits on state prerogative.

And unlike the Roman idea of sovereign power as immanent in the emperor and symbolising the might of universal empire, sovereignty in the modern epoch reveals itself in the form of international plurality: a system of sovereign states. The transformation from a medieval world of territorial fragmentation into an international system of uniform political entities hinges on the concept of *public realm*—a purely formal concept. This gives additional support to the conclusion that while the question of territoriality and land jurisdiction has been a lasting concern in the history of European legal and political thought, it is not *decisive* for identifying the principle of sovereignty, as it elucidates the modern sovereign state.