

From Theirs to Modernity: The Concept of State – Middle Age Interpretations from the 20th Century and Beyond

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The concept of State has been crafted both in a sequential linear fashion as well as consecutively and concurrently by a multitude of actors, eras and impetuses. It is for this reason that it has been such an elusive and intangible idea throughout time, offering itself for mere moments, but ultimately presenting itself as nothing more than an enigma. From Theirs to Modernity attempts to find reason in the noise of the Middle Ages, to identify elements of transition and flux that took such concepts as representation, jurisprudence, religious politics and governance to a greater and loftier position within society. The article intentionally focuses on the work of Gaines Post, Harold J Berman and Ernst Kantorowicz and extrapolates elements of medieval history, transposing them into the theories of these authors with the intention of discussing what might be considered factors that are influential in the formation of what we might regard as the State. The aim of the article is to create a heterogeneous construct that is composed of a combination of historical events, twentieth and twenty-first century commentary, and a systematic study of these ingredients, projected onto the Middle Ages through to modernity without the restrictions of chronology.

Introduction

‘The medieval raison d’état was no more clearly defined than is the modern one’ – Gaines Post¹

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A variety of legal-politico factors have changed society in the Middle Ages and early Modernity that would have contributed to the way in which the concept of statehood might have been organised, and its progression managed. This has changed the nature of governance in western European territories throughout that period into later times – this essay concentrates on the Middle Ages and early Modernity. I discuss the idea that through a combination of elements that had developed across Europe, such as the Holy Roman Empire and Roman Law, which, having interfaced with customary and tribal mind-sets, have helped drive new visions of the state; ideas on what a state might be and how it should have been managed, the political relationships that developed between players and the idea of the rule of law and its execution throughout that time.

We are only able to understand the legal entity that we call a state from that which exists in the present day – we can only see through the spectacles of the time that we exist in – and therefore what we consider must be a reflection of that pre-existing awareness. Memories and history are merely related reproductions of an era that we cannot access accurately. Although we can study records, this does not mean that there did not exist a culture or custom that chose not to record or hand their laws down through speech as it passed through generations. This means then that our process of interpretation and reinterpretation is analogous to the reassembling of fragments of a broken mirror, where the aim is to see a true and clear reflection. What we actually have is an image of what once was but it cannot be perfectly presented as a true reflection of the past. Some of the pieces are in the wrong order or are unclear, others are perfectly clear but we can't make out what that individual part refers to in relation to the other pieces.

This essay places to one side the impracticalities of making sense of the past in the context of the present and uses twentieth century writers to transpose a variety of ideas onto the Middle Ages and

¹ Gaines Post, *Studies in Medieval Legal Thought: Public Law and the State 1100-1322* (The Law Book Exchange 1964) 301.

Modernity with the intention of providing a vision of how developments in legal history might have helped drive alternative viewpoints of the concept of state. Additionally, while using some of the players throughout the era studied, who help attest to the breadth of influences there have been on these standpoints and positions, there is an indication that the mere concept of chronicling cannot provide the perspective sought, and that there are many different actors, from many eras, that are seemingly unrelated, but when read together, can create the picture of one single synthesized performance in history.

As Maria Aristodemou points out in *Law and Literature: Journeys from Her to Eternity*,² when we witness death we do not experience it. There is a connection and empathy to the situation, but it is not a true experience of the event. With legal history this is many times removed and thus the distance from the origin amplified. As such, the historical track that we follow will have deviated from the original course a long time before we take up its reference. This essay is therefore less an analysis of history and more one of ‘their story’ – that is, a composite of extrapolated accepted historical content and interpretations of theoretical perspectives and writings in order to create a new dialogue between the past and the present in a non-chronicle format. In doing so we acknowledge that:

The stories we tell of our past are constitutive not only of our past but also our present identities, individual and collective. We remember, or try to remember, in order to understand ourselves living in a time and with others. The texts and images we employ to tell these stories do not present themselves neutrally but in codes that are always and already political.³

² Maria Aristodemou, *Law and Literature: Journeys from Her to Eternity* (OUP 2000) 195.

³ *ibid* 182.

Representation and Agency

The concept of Representation of the person had not emerged in Europe in the Middle Ages in the form by which we would currently recognise it. The numerous township principalities and fiefdoms required a more intimate kind of rule under the feudal system, which existed between the 10th and 13th centuries, effected with more immediacy than required to govern a modern 'state'. That is not to say that sentiment for the concept of representation did not exist in medieval western Europe or that its development was not in motion. However, it was not to the extent that it exists in our society – a concept of unified representation for mass society with one driven ideology shared by the majority. Gaines Post refers to a development of representative rule in the late 14th century as having developed from a two-pronged concept of *Plena Potestas*. This 'authority to represent' had partly originated from Roman Law through the introduction of Justinian's *Codex 2, 12, 10* and developed as a form of various representation and agency permissions throughout Europe. In his 1943 paper on the subject,⁴ Gaines Post looks at the alternative interpretations of the concept.

Referring to both FW Maitland and F Pollock, in *Medieval Legal Thought: Public Law and the State 1100-1322* Post suggests representation (in England) was directly associated with the kings' summoning of representatives in order to hear royal proclamations in view of these being assented-to by the people. The second of Post's prongs gives us an image of the representative of the people confirming *involuntarily* that they acknowledge the proclamation.⁵

Interpretation of the concept of representation in that era is conflicting. Even back then there were disputes as to the strength, meaning and way in which the agency of *Plena Potestas* should be regarded as having been legitimately exercised.

⁴ Gaines Post, 'Plena Potestas and Consent in Medieval Assemblies: A Study in Romano-Canonical Procedure and the Rise of Representation, 1150–1325' (1943) 1 *Traditio* 355.

⁵ Post (n 1) 92.

Post concerns himself with the concept of representation with regards to its position within the realm of Roman and Canon Law at that time (in the 1300s). As he explains, the *Plena Potestas* of that era was taken directly from Roman Law – and he cites as an example, the use of representation and agency in a Roman Law from a Code by Emperor Alexander Severus (from 227AD), which dictates law regarding legal representation and agency and liability in the courts.⁶

This indicates that by the 1300s, agency and representation was very much establishing itself and finding its way into the public realm through the Royal Courts (and in England, Parliament).⁷ An indication of the development of *Plena Potestas* from private to ‘state’ representation can be seen in Canon Law where in the late 12th century in an *Ordo Iudiciarius*, a proctor was granted *Plena Potestas*, which was followed 20 years later by Pope Innocent III using the phrase to summons proctors of towns and cities to the Curia with full power to act – Gregory IX passed a decretal 30 years later stating that those sent to the Papal Curia must have full agency and responsibility.⁸

By the late 13th century these powers were accepted as normal without requiring mandates – representation was becoming de rigeur of legal and administrative life in courts across Europe. Prior to 1241 Saxon Summas included a *regulated* form of representation and by 1250, a much more generalised and wider concept of it was realised. In England and France this had become accepted practice in both Ecclesiastical and Secular court systems.⁹ The general public had developed a method of general representation together with specific permissions, and, where the Pope had already begun to use the concept for cases at the Curia, cities were also starting to use the same

⁶ Being Roman Law, it is, of course, discussing agency in the private law context.

⁷ Although not having established itself within the modern concept of the ‘state’, representation had certainly been apparent in texts of the 9th century and in Canonical works in the 12th century. Post’s example of the concept within the private realm of Roman Law in the 1300s was simply that a representative (proctor) had come to court with the permission to act in the interests of his dominus.

⁸ Decr. 1 38, c. 10 Accedens.

⁹ Post (n 1) 101.

concept to permit the signing of truces and treaties (still using Roman Law) and this was used regularly throughout the twelfth to fourteenth century by rulers, both spiritual and temporal – this included the famous handover of Jerusalem in 1176 – but was in use even earlier still in England.¹⁰ Post shows that the concept existed in England prior to the introduction of it in Bolognese Roman Law and that the switch from English to Roman terms and usage seems to occur between 1172 and 1215.

That described above is not the only definition of a state whereby it consists of two elements,¹¹ as far as the concept of representation is concerned. Carl Schmitt regards the State as being ‘a certain status of people, specifically, the status of political unity...State is a condition, the particular circumstance of the people. But the people can achieve and hold the condition of political unity in two different ways.’¹²

This could be construed as: There is no state without people and that without some form of common identity, the people are not unified, and so the state cannot exist. This indicates that there are also social concepts of what a state might be considered to contain in the modern world, and this is a very different model from the development of the state of the Middle Ages, where the population were not politically unified in the same sense that a modern sovereign state might be regarded as today.

That is not to suggest that as a people, it was not politically united. Schmitt regards a realm governed by an ‘Absolute Ruling Prince’ as a politically unified state. Schmitt cites Hobbes and confirms his belief that the creation of representation is one of the initial parts of the

¹⁰ *ibid* 104.

¹¹ Additionally, there was another two-way split under the concept of *Raison D’État*, which would consist of governance through (1) ethical rule according to God and Natural Law, along with (2) the newly established system of legal jurisprudence – the king as representative of both God and the people.

¹² Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr, Duke University Press 2007) 239: Schmitt suggests these are (1) direct political action of a unified conscious similarity, and (2) firm natural boundaries or other reason.

process of establishing the unity of the people.¹³ With Schmitt's understanding of the state form, therefore, there exists a consensus of public body and a representative of that body – perhaps, for example, as a ruling king or as elected government. In this respect, we can consider the concept of representation in the Middle Ages and its development of it during that period is a contributing factor to the development of the way in which we understand the concept of the state today.

In modernity, the unity of the people was considered by Henry VIII when commenting on what might be regarded as the union between representation of the population in tandem with a unity of political awareness – which supports Schmitt's theory of a state's public requiring a political union of consciousness. For Post, this is realized in the Statute of York, which embodies the concept of a common welfare and a will to preserve the state.¹⁴ Post takes the concept slightly further in terms of the English system and suggests that within this representational system, which was established on a variety of levels, representatives were required to acknowledge and cooperate with the other representatives (of the people and of the realm) and in doing so created a political and constitutional principle of government. Although Post does acknowledge other examples of what defines the state, including the term 'the government',¹⁵ and uses the example of Louis XIV ('L'État, c'est moi') who might have regarded himself to understand the common good of the population along with a will to preserve the political position of France at the time; the concept of *representation to a wider level* appears to be the consensus.

¹³ *ibid* 247: 'The absolute prince is also the sole representative of the political unity of the people. He alone represents the state. As Hobbes puts it, the state has "its unity in the person of the sovereign"; it is "united in the person of one sovereign." Representation first establishes this unity. Nonetheless it is always the unity of a people in the political condition that is produced. The personal quality of the state lies in representation, not the power of the state.'

¹⁴ Post (n 1) 332: 'Finally the theory of public law and the state is thus expressed in the Statute of York, in the joint action in Parliament of king as head and of the members of the body of the realm to assure the common welfare of all and preserve of the state.'

¹⁵ *ibid* 334.

Prior to the concept of representation described above, it appears that communities were particularly well versed in communal representation and decision-making. Between the 10th and 12th centuries the position of societies was that wrongdoing (personal and public) was policed and judged by the community. As a collective representation of the inhabitants of that area, they would take collective responsibility for the administration of justice. In this sense we must understand that justice was not necessarily a form of criminal justice but what was morally and customarily the right thing to do. Many of the lawsuits in this earlier period were what we would consider to be civil or private law suits, where recompense of the wronged party was sought. On other occasions it may have been ‘criminal’ wrongdoing.

Susan Reynolds has suggested this era as being very different from what traditional historians may have originally thought. Where many consider the civilisation of the legal system having occurred with the influx of Roman Law and Canon Law (along with professional legal practitioners); Reynolds argues that there was no less a sense of law being practised prior to the 12th century but rather that it was more a system of custom – customary morality, customary law, customary norms; sometimes even written down. The practice in local communities across Europe was no more or less formalised therefore than later times, but rather, it had not been as well-recorded – making it harder to penetrate through the theory that post-Iuris Civilis and Decretum eras were somehow more ‘positive’ in the way they lived and practised the upkeep of the law through the concept of representation.¹⁶

However, this does not mean the concept of representation was disregarded in that earlier medieval period. Even in the ninth century kings were delegating the role of arbitrator to noblemen and there already existed by then representatives from the community that had been nominated as permanent members of judicial hearings on be-

¹⁶ Susan Reynolds, *Kingdoms and Communities in Western Europe 900-1300* (2nd edn, OUP 1997) 23-36.

half of the king or lord. This type of representative hearing slowly replaced the collective judgments indicated above, and this allowed collective judgment to give way to collective representation for legal matters.¹⁷ Additionally on the mainland, Charlemagne had entered into a process of codification of custom and tribal law.¹⁸

Governance and Power

In *Law and Logos*¹⁹ Berman regards the modern concept of the way in which a state is governed as being a morphed combination of that from Christian Jurisprudence (a legal embodiment of the trinity, and itself composed of elements of Roman Law and Canon Law), combined with an historical filtration of the concepts of positivism, natural law and historical jurisprudence. The dominant of these three in the west (positivism) has created a concept of the state which prefers ‘Politics, Order, Will, Power, Legislation and Rules’ as the tools to governance.

The ‘Christian Jurisprudence’ he speaks of is the unification of three essences, taken from St Augustine.²⁰ Berman states that, in the years prior to modernity, where Natural Law was the prominent movement and concept of governance, the State was ruling under an era of consciousness of the existence of a higher morality;²¹ a higher morality dominant to the extent of relegating rules to second place below the idea of fairness.

¹⁷ *ibid* 24-27. Note the delegation of a case by King Alfred the Great, King of Wessex. All over Europe, presiding ‘Scabini’, and their equivalent in England, were introduced to conduct arbitration as an alternative to collective judgments. At times, these were the only type of hearing available in France. These adjudicators would be expected to have knowledge of local law and customs owing to their dealings in the community – such as land holders.

¹⁸ See Papal Revolution section later in this essay.

¹⁹ Harold J Berman, ‘Law and Logos’ (1994) 44 *DePaul Law Review* 143.

²⁰ *Esse* (which he interprets as Memory), *Velle* (Will/Desire/love) and *Nolle* (Knowledge/Reason). He transposes religious connotations into governance directly (God the Father, God the Creator, God the Lawgiver).

²¹ ‘Inborn reason and conscience’.

Berman also describes a second mode of thought, Historical Jurisprudence, by which we might be differently navigated in our consideration of the functions of the state. Historical Jurisprudence considers our governance from an historical perspective – as experiences of the past in unison with tradition and custom. In this respect it appears that the understanding of what a state is responsible for, and how it goes about its governance, appears to be fundamentally different in the pre-and post-1600s. In the period of a few hundred years leading up to 1600, there appears to have been significant changes in the way that society both viewed and understood the concept of law – on the one hand, a pseudo-religious understanding, while on the other, a concept of reason. Continuing within this were traditional influences and historical methods of maintaining justice. This would constitute a further development from the concept that was espoused in the 13th century.

Berman considers an era in which the concept of governance was changing, but it is also important to consider that aspect of the state in which governance was not only developing, but had formed some kind of stability; enough permanence to consider it to have an independence from a more powerful controller and where a principality or territory was capable of sustaining itself. This ability to self-support may have been through the fighting abilities or through political collaboration – even against the emperor – which helped create a forerunner to what emerged as a state more closely resembling the type that we understand it to be.

In the Middle Ages, this was a rare position to be in and so a concept of ‘Nation State’ was even less relevant to the peoples of Europe than that of a ‘State’. This may have been because Europe was a series of related tribal kingdoms and cities, partly autonomous, partly imperial provinces, and sometimes, church territories. The rapid growth of structured legal institutions through the legal jurisprudence emanating from Bologna, instilled a more modern sense of the rule of law throughout the Holy Roman Empire, however it was very much an empire, rather than union of states and itself in a fluid composition – owing to both crusading ventures and clashes or even negotiations

between it and other territories; for instance, Frederick II's ascension to the crown of Jerusalem.

Berman, in *Law and Revolution*,²² when discussing the Papal Revolution of the 11th century, acknowledges that although prior to this, there may not have been a complete legal system that is recognisable as we understand it to be; for example, the legal system that existed during the feudal system that was in place in England was a development from Anglo Saxon tribal customary law.²³ However, there were 'legally constituted authorities that applied the law'²⁴ across western Europe. The main difference between what we would regard as a legal system now and what was apparent in the Middle Ages is that laws were not created through independent reason developed as a science.

The development of the rights of lords and the kings in the feudal legal system had not been formally universally enforced until developments allowed for agreements such as those contained in the Magna Carta in 1215. Even then some of the quantum of rights was not fixed.²⁵ Where the Magna Carta developed a formally recognised series of rights for the lords and their overlord of the time, the *Confirmatio Cartarum* would see the issue of quantum addressed in 1297 – effectively limiting the king's ability to secure finance around the kingdom to fixed figures.²⁶ It is therefore possible to see that in this period of the 13th century, there was a discernible change in the way in which the king was able to exercise rights, transposed into law. The development of statute law appears to have become popular in the 13th Century where legislation such as the Magna Carta, *Confirmatio Cartarum*, Statutes of Westminster I and II contributed

²² Harold J Berman, *Law and Revolution: the formation of the Western legal tradition* (Harvard University Press 1983).

²³ JGA Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (CUP 1987) 99.

²⁴ Berman (n 22) 49.

²⁵ Clauses 2, 4, 5, 12, 15 of the Magna Carta were all limits to the powers of the king. For a digest see John Malcolm William Bean, *The Decline of English Feudalism 1215-1540* (Manchester University Press 1968) 13.

²⁶ *ibid* 13.

to the foundations of a legal system that would remain until the 17th century in England.²⁷

The way the law existed in the 13th century was little separated from the local custom and tribal law that was prevalent at the time,²⁸ and there was nothing recognisable, that might be considered comparable to an independent judiciary separate from the king's court.

Where the 1200s were a time without a traditional legal system as we know it, the Crown did in fact rely on the concept of an embodiment of the law, and so did the population. In particular, during the period between the 1200s and 1600s the development of land and property law appears to make an obvious transition. This can be seen in the Statute of Quia Emptores in 1290, a piece of legislation enacted to allow free men the right to sell for his own benefit his land or tenements, along with the abolition of the right to subinfeudation. The motive for introduction of such a statute has been debated by legal historians, including Pollock, Maitland and Plucknett. For Maitland, it appears that there was an interest rift that had developed between the king and the powerful lords, and that this was an expression of the Crown to gain something at the expense of the lords. Plucknett interprets the same statute differently, claiming that it was a reinforcement in writing, of a custom that had already existed for many years before, and that it merely published the respective parties' positions. Bean offers two criticisms of Plucknett's analysis on the statute. Firstly, that there is no recorded evidence that there was a commonly adopted custom of alienation of landholdings, and secondly that he fails to discuss the previous enactment regarding the Crown's right to license alienations.²⁹

In the early Medieval period early on in the ninth century, the newly crowned Frankish 'Emperor that governs the Roman Empire', Charlemagne, had started to codify the customs and laws of the peoples

²⁷ *ibid* 15.

²⁸ Berman (n 22) 50.

²⁹ Maitland offers evidence of the Crown asserting licensing rights to tenants in chief in the Edict of 1256 For a full discussion of land law in the late Middle Ages, see Bean (n 25) 80.

of the empire – such as the *Lex Thuringorum* and the *Leges Saxonum* as well as the laws of Alamans, Bavarians, Chamavians and others. These along with the pre-existing *Lex Salica*, which would cause Edward III great problems in the later Middle Ages when dealing with territories in France, display a willingness for the European rulers to begin to record a permanent format of the rules that the societies lived by in the early Middle Ages.³⁰

However, although this appears to suggest a reliable legal infrastructure was taking hold, this was far from the reality and the science of law was yet to be broadly realised. For example, briefly concentrating on the era that Frederick II was both Holy Roman Emperor and effective King of what was then, in the 13th century, the Kingdom of Sicily – with Constance his wife as regent, and his son Henry VII as king of Germany; Frederick mastered a ‘universal’ domain. Despite this he struggled with the same, due to clashes with an engrained culture of traditionalism and tribal mind-set of the princes of the Germanic peoples under the empire.³¹ This attitude to control of principalities and kingdoms supports Berman’s idea that ‘historical jurisprudence’ was prevalent prior to reformation. Although the Emperor was able, and did create, imperial law, local princes were able to overrule or withdraw it for their principality or territory.

This, along with the continued relinquishing of power to the princes, allowed them more independence than that afforded in other territories of the empire. Sicily itself was a sizable kingdom which had kept the *Curia* on its guard for a long time, yet it was required that the princes of the kingdoms of the Germanic parts of the empire vote and support Frederick’s choice (his son Henry) when he wanted him as King of Sicily before Frederick could become the King of Germany; there was no such requirement to ascend to the crown of Sicily. This pressure was partly due to the church, which had agreed with Frederick that he could not personally maintain the title of King of Sicily

³⁰ Roger Collins, *Early Medieval Europe 300-1000* (Macmillan 1991) 16.

³¹ Ernst Kantorowicz, *Frederick the Second, 1194-1250* (Constable 1957) 261.

and Germany – an agreement that his son's ascension to his reign would inevitably circumvent.

As acknowledgment from the other kingdoms might legitimise their own kingdom, it appears that the princes became more confident. This worked against Frederick II inasmuch as he was unable to act directly within that part of the empire and was at the mercy of the princes; who had much greater access to armies than he had been capable of securing, prior to his marriage to Constance of Aragon, which came with the added benefit of 300 knights.³²

Therefore, although the empire had been regarded as a state, it could not operate in the manner of a state as discussed in the previous section, due to the series of relationships that were necessary to maintain power and governance; certainly a unified political consciousness would have been lacking, considering that in the early years of Frederick II's minority reign of Sicily, under the suzerainty of the papal office, Sicily was rife with warring factions vying for power.

Jurisprudence

Where laws were certainly the standard use of governance of a state in the early-mid Middle Ages, from the 12th century onwards with the emergence of the *Corpus Iuris Civilis* and the *Decretum Gratiani*, a change in law occurred (and therefore in the way the population was governed). Prior to this period the law was communicated through lay-people in the community using a synthesis of the kingdom's local, customary and tribal law.

³² 'In 1209 Frederick became out of age and, free at last from the custody of Pope Innocent III, married Constance of Aragon, who brought him a dowry of 300 knights thanks to whom he succeeded in stating again his rights on Germany.' See Ministero per i beni e le attività culturali, 'Castel del Monte (Frederick II)' (Ministero per i beni e le attività culturali, 2007) <<http://www.casteldelmonte.beniculturali.it/index.php?en/97/frederick-ii>> accessed 01 March 2013.

After this period, due to the onslaught of voluminous laws being released throughout western Europe via Bologna, and the subsequent need for development of a legal profession, both governor and governed were having to rely on trained professional lawyers to both represent and comprehend the bodies of law; which spread through the western world in the form of Roman Law and Canon Laws. However, where in the present day, we would consider most things in our daily lives as having a form of legal ramification, in the Middle Ages, there was much less concern about this and the concept of a legal state, a state as a legal entity with a comprehensive body of law at its foundation, was inconceivable.

In *Twelfth-Century Europe and the Foundations of Modern Society* Ernst Kantorowicz discusses not just the development of the legal profession but how it related to governance and the state. Initially, kings had gone from being ultimate rulers to being reliant on lawyers to both represent their affairs (for example, perhaps in the case of a confrontation with the Church), but also with regards to interpreting those laws for administering judgments of that kingdom.

The development of a legal profession changed the way in which rulers were ruling. Some of the law introduced had developed privately from scholars' own interests (e.g. Gratian), rather than from an assertion by the governing power to introduce it. In this respect we see an introduction of a method which is familiar to our own era (the use of legal jurisprudence) and yet at the same moment, a concept which is so alien to our way of modern governance (third party introduction of law).

Prior to the introduction of this developed legal jurisprudence the law was administered by: 'jurisprudential laymen (kings, counts, clerics, noblemen, or *missi* of any kind).' Kantorowicz highlights that by the time of modernity, legal professionals were so well established that even the king could not take matters into his own hands without an upfront challenge. At one time, during a fracas between Sir Edward Coke and King James I, where the king declares to protect the law, Coke, perhaps intending to dispel any potential for tyranny

stated: 'No, the law protects the King.' Coke then elaborated on how subjects are better protected by the law when those learned in it do the judging.³³

It has often been said that because of this famous standoff³⁴ with the king, that Coke was somehow an anti-monarchist or particularly against the establishment, perhaps an indication of a change in the attitudes of the time. However, this would be to underestimate the personality and traits of Coke as an individual. His assertion of law 'against' the king was merely the workings of the strong, fruitful, charged relationship that he had with James I. This incident was not an isolated case, and additionally it was not only with James I that Coke would maintain such exchanges. Coke's quarrels 'were political, professional and personal.'³⁵ Indeed, as Allen D Boyer has contemplated, James I was not averse to giving his servants a long rein from which to operate, if this meant that they could be relied upon or were counted on as having a gift for, such as Coke, legal analysis and a flair for reinforcing through the law, the omnipotence of the monarch – particularly with regards to the development of taxation and land revenue.³⁶ Of course Coke was not merely interested in serving the crown, but actively wanted to develop the law as a public servant, even drafting a bill for 'An Act concerning monopolies and dispensations with penal laws.'³⁷

³³ Ernst Kantorowicz, 'Kingship Under the Impact of Scientific Jurisprudence' in Marshall Clagett, Gaines Post and Robert Reynolds (eds) *Twelfth-Century Europe and the Foundations of Modern Society* (University of Wisconsin Press 1961).

³⁴ 'This was indeed an explosive scene, with the chief justice lecturing the king and the king waving his fist at the chief justice – but the confrontation was the friction of a working relationship.' See Allen D Boyer, 'Sir Edward Coke: Royal Servant, Royal Favorite' (Ames Foundation, Draft Papers Given at 18th British Legal History Conference, 2007)

<<http://amesfoundation.law.harvard.edu/BLHC07/Boyer%20Sir%20Edward%20Coke%20-%20Royal%20Servant%20and%20Royal%20Favorite.pdf>> accessed 1 March 2013.

³⁵ *ibid.*

³⁶ *ibid.* 8.

³⁷ Stephen D White, *Sir Edward Coke and the Grievances of the Commonwealth* (Manchester University Press 1979) 128.

This indicates that around the late Middle Ages and into early Modernity an acceptance of another change in the method of governance mentioned above becomes apparent – where kings were subordinates to the law – which can be married to Berman’s consideration of Natural Law in the Middle Ages. From Coke’s era in particular, the 1600s, a form of the law itself appeared to become the governing power; with the ability to be asserted in its own name.³⁸

This new understanding of jurisprudence was realised after the ideas of Aristotle were reconciled in the 13th century with the concept of man as the follower of God. Walter Ullmann³⁹ suggests that this realisation of the autonomous man and the Christian in one person – able to differentiate from his Christianity the concept of exercising his human and political awareness, allowed for the development of Aristotle’s concepts to be used in conjunction with the concept of legal jurisprudence. He indicates⁴⁰ that it was Thomas Aquinas, the 13th century theologian, who was one of the advocates of this collaboration between philosophy and theology (or reason and faith), and attempted to analyse and redefine the concept of justice in the Middle Ages.

Papal Revolution

In the early Medieval period prior to 800 the Curia required the help of the rulers of European kingdoms to protect its land assets and power reach. It has been argued that the imperial coronation on Christmas Day of 800 was the catalyst to a major change that would follow, altering the power of the players. Where the Frankish Emperor Charles would now be able to alter his title to *Imperator Im-*

³⁸ In this respect we see the concept of law as a device which developed from governing tribal issues, to one which then governed kingdoms with reason, which can be contrasted with modern day law which is itself all-governing – that is to say, it governs the governor and the governed. This would not have been possible in the Middle Ages, although as we have seen, it did at least provide a foundation and healthy disposition for the concept to be developed.

³⁹ Walter Ullmann, *The Law and Politics in the Middle Ages* (Hodder & Stoughton 1975) 267-306.

⁴⁰ *ibid* 272.

*perium Romanum gubernans*⁴¹ and where there was a change in the way in which the Frankish empire would hand down laws – reverting to written law, the acknowledgment by the Papacy as a Roman Emperor would require a closer working relationship between the two offices for future Emperors, in effect giving the Curia a protected status against the Lombards at the expense of the Byzantine.⁴²

However, the greater issue regarding the acknowledgment of the Pope as crowner of the Emperor was that in doing so, Charlemagne in 800 and later Louis the Pious in 816 had created a catalyst that would see later Emperors requiring the acknowledgment of the Church before they could be considered rulers of the empire. This reversal of power positions that became effective in 823 is blamed on Louis the Pious, as having re-initiated a procedure that need not have been used. The reciprocal nature of the Emperor looking after the Papal office in exchange for uniting Christians under a single ruler may well have been the aim, and if so, the move, although in hindsight led to the Curia gaining more control over secular leaders, was an obviously strong strategy to play. Furthermore, as Roger Collins suggests, the closer working relationship that the rulers had with the Papal office, such as that of co-Emperor – Louis' son, Lothar, did not see this reversal in power. In 824 the Emperor ordered Lothar send his missi to investigate issues that had come to his attention at the Curia. On another occasion, in 823, after Pope Paschal I had sentenced two of his officials to execution, Louis sent missi to investigate. Additionally, in 827 no new Pope could be ordained without the approval of the imperial missus having inspected the proceedings and given approval.⁴³ This is not the action of an emperor under the control of the Papal office, particularly as Rome was dependent on the Francian emperor politically and for its security. But did the reciprocal nature sow the seeds for later change?

The Papal revolution effected a major 12th century alteration in the way in which governmental order was executed. An era of struggle

⁴¹ Emperor governing the Roman Empire.

⁴² Roger Collins (n 30) 269.

⁴³ *ibid* 269.

between the kingdoms and princes of Europe, their relationship with the church, secular entities such as chartered cities and towns, the manorial system, the lord-vassal unit, the merchant guilds, and the territorial duchies, along with the secularized empire, this era was further endowed with the acknowledgment that the Papal office alone held the power of supreme ruler of the clergy. And at the end of that era, when the Pope embarked on a positive programme of reform against the princes, subsequent generations began both to acknowledge and feed into the institutions and protocol of law, further disturbing the settled status of the king and the church.

Berman restates the Pope's assertion of his status as independent of the secular institutions of Europe, and holding complete supremacy over the entire western church – Not only was the church in control of its own territories, as a kingdom, but it additionally held supremacy over all things religious in all the kingdoms of western Europe, too.⁴⁴

This may appear undemocratic in the modern day, to declare supremacy over a foreign kingdom, which already held allegiance to a king and empire. However, it was this assertion that led to the foundation of legal systems as we understand them in modern times. Starting with Canon Law and procedural rules on how trials (both against the layman and the clergy) could be conducted along, criminal punishment and property law, dominant areas of church law would see it influence other areas of society including the courts of the king under the auspices of secular institutions.⁴⁵

Berman believes that western attitudes and the way we comprehend law and legal systems today cannot be fully appreciated without understanding first of all where these systems and laws came from and what they had been a reaction against. To that extent he regards it as

⁴⁴ Berman (n 22) 50: 'This was a revolution, declared in 1075 by Pope Gregory VII; the papal party and the imperial party fought it out in bloody wars for almost 50 years, and it was only after almost one-hundred years, in 1170, that the martyrdom of Thomas Beckett sealed the final compromise in England.'

⁴⁵ *ibid* 50: 'Canon law, urban law, royal law, mercantile law, feudal and manorial law.'

necessary to understand the ‘Germanic alternative’ that had been rejected in favour of what occurred in the 12th century. He also offers the idea that although the method in which laws were created and judgments made had been dropped, the actual Germanic laws were often sustained, becoming part of the new jurisprudence. Moreover Berman supports the idea that it was the commonality of the Christian religion across Europe that allowed the new development of legal systems to become established. He cites the development of the ecclesiastical court system with its legal system, legal professionals – adept at both Canon law and Roman Law, with its cases judged by trained professionals.

This paved the way for the secular institutions to be developed or established by the relevant governing entities of the time. In this respect, he cites Christianity as being the midwife to the law as we understand it to be. This development is a far cry from the vision of the king in the early Middle Ages; who, as a local or tribal overlord roamed his kingdom as both ruler and judge placed on the throne by God.⁴⁶

In the same regards, where a tribal lord was merely a pagan local ruler, Christianity offered him some kind of furtherance of his position in power by confirming him as king and thus he was able to establish himself as the representative of both the tribe and God’s authority. This ‘promotion’ enabled him to wield more power and extend the reach of his kingdom encompassing more tribes.

Reasoning of State

Gaines Post positions the kings as having acquired a supreme right over ordinary citizens to keep the peace of the realm and necessarily render the private rights of free-men (whom had established a protocol of representation in royal assemblies, as discussed earlier) to a subordinate position, assuming that right had been handled proper-

⁴⁶ *ibid* 66.

ly.⁴⁷ The kingdoms of Europe later embraced, from the 12th century onwards, a culture of public law based on the development of Roman Law and Canon Law that was emanating from Bologna; and with it, the developing concept of legal reasoning and governmental methods of ruling.⁴⁸

Where Berman regarded the church as empowering kingdoms to establish law, which would later help provide a structure to establishing 'states', Post expounds a concept of state as much more about how it reasons its governmental behaviour than the creation of national borders. Furthermore he suggests that rather, perhaps more-so with the definition of a Nation State, the 'state' in modern times has connotations of a national identity of sorts – a specific or similarly-accepted or adopted culture.⁴⁹ Post quotes Friedrich Meinecke's model of a state, suggesting that national identity and culture is not the fundamental ingredient of a state, but rather – national necessity, which is embodied in a presupposing of a 'supreme, independent state that is in no wise subject to a universal religion and its moral commands.'⁵⁰

Post himself suggests that the Greek city-state and the Roman Empire were both independent states with an attributed reasoning. If this is contrasted with the cities, fiefdoms, kingdoms, territories of the Middle Ages, and particularly around the time of Frederick II, then what is suggested is that rather than the concept of state developing and being established, we see either (1) a change in the concept and reasoning of what a state is, or (2) a departure from the reasoning of state to a break-up of its authority into principalities and provinces; for example, the Holy Roman Empire.

⁴⁷ Post (n 1) 241.

⁴⁸ *ibid* 241: 'The remarkable achievements of such kings as Henry II and Edward I of England, of Philip Augustus, Louis IX, and Philip the Fair of France, and of Roger II and Frederick II of Naples and Sicily are themselves an indication that they and their advisers had some understanding of public law and how its rules pertained to central government.'

⁴⁹ Nation state *n.*: 'A sovereign state of which most of the citizens or subjects are united also by factors which define a nation, such as language or common descent'; *Oxford English Dictionary* (OUP 2010).

⁵⁰ Post (n 1) 242.

In this case, what had developed was an empire under one religion and set of morals, under which was a fractured plethora of smaller kingdoms and land holdings, some of which were owned by the church. The church was, in the case of Frederick II's empire, at the forefront of the reasoning of the head of 'state' where crusades would be carried out in the name of the religion in order to both convert foreign lands and extend the reach of the empire at the same time.

This does not sound like a 'state' that is independent of religion. Alternatively, one might regard Berman's concept of state as a little closer to the modern day idea of what a state might be, particularly in the case of the establishment of the Papal State under the Donation of Sutri in 728AD. Meinecke was more concerned with the signification of the *Ragione di Stato's* characteristics – and for him, it was much later, in the earlier 1600s where the true identity of the state was realized.⁵¹

The realisation of the identity of a thing such as statehood was certainly present in the 13th century. This can be seen in the letter to Frederick II from Pope Gregory IX who was concerned with the emperor's penchant for making laws.⁵² Kantorowicz, however, indicates that perhaps Frederick II was starting to, either personally or politically, regard the church as redundant.⁵³ He himself had, by then, adopted as the empire's motto, 'A Secular State plus the Church.'⁵⁴

Part of the fundamental difference between the 11th and 16th centuries was the influence of the church in secular activity and governance. Although monarchs and emperors alike were claiming to up-

⁵¹ Friedrich Meinecke, *Machiavellism, The Doctrine of Raison d'État in Italy and Germany* (Douglas Scott tr, Yale University Press 1957) 119: 'We shall content ourselves with observing that the word stato now began to be given greater content; it no longer signified the mere power apparatus of the ruler, but was capable of meaning, ... domino, signoria, regno e imperio in general.'

⁵² Kantorowicz (n 31) 261.

⁵³ *ibid* 262: 'It might well seem as if the new secular state, based on Law, Nature and Reason, and entirely self-contained, formed so independent and complete a whole that it had neither need nor room for the Church.'

⁵⁴ *ibid* 262.

hold Christianity, the political sway that the church offered, was less prominent than in previous centuries. This was despite the battle with monarchs across Europe, which led to the reforms that saw Gregory VII's office claim supremacy over all things ecclesiastical.

This division in power allowed kings to claim secular domains for themselves as rulers of the people, but this did not mean that they would not use Roman Law to increase their status as being both defender of the law and priest (of justice). The kings sought a 'noble' office to reinforce their position where the religious function had been withdrawn. The 'Second Middle Ages', as this era has been described, saw the demise of the devoutly religious ruler. It was in this same period that the function of the state in general changed, and governance became a duty of central administrative offices rather than through the control or sway of the nobility or courtiers.⁵⁵

Van Caenegem tells how the framework of the state in the modern concept became apparent in those Second Middle Ages. He suggests that rather than the concept of a national territory becoming established and giving rise to a structured system of governance, in fact, some 'states' such as England, Hungary and Denmark, were countries which then developed the notion of statehood as depicted above, while in other territories across Europe, particularly what is now France and Germany, where control was not absolute, and what existed were a series of principalities, the notion of the structures of statehood was established prior to the national boundaries. This gives us a view of the state in the Middle Ages as a concept rather than a geographical territory.

However, it is a concept which provided the foundation for what we generally would regard a state to consist of, that is, through a reasoning that the authorities use to justify, through ethical and moral viewpoints in combination with legal jurisprudence for the good of

⁵⁵ RC Van Caenegem, *An Historical Introduction to Western Constitutional Law* (CUP 1995) 72.

those domiciled there, a policy of local, domestic and foreign interactions – the ‘state’ being an ‘empire, republic, realm or city.’⁵⁶

Political Ethics and Rule

Kantorowicz argues that in the 12th century an additional change occurred with dramatic influences on the notion of state. Roman Law influenced political ethics and references to Justinian’s Code were used to highlight the public nature of the king’s office. The office itself was starting to be referred to then, as an entity that does not die – a representation. Then began a concept of understanding officeholders merely as representative of the institution.

However, what we can see from the Roman Law (as interpreted at that time), is that it supports both the concept of the king as an absolute sovereign or ruler,⁵⁷ which would become more popular in the later Absolutist period, and also supports the concept of the prince being bound by the law.⁵⁸ In the 12th century in England and France, the crown started to be referred to, somewhat similarly to how we in the modern day might use the word: in the abstract, to represent, not the king himself, but the administration of the ruling power. At the same time, according to Gaines Post, the crown was also referred to using a paternalistic notion of perpetuity, in the word ‘Patria’.⁵⁹

The reference to a new understanding of the offices of the state as a separate entity to the actual ruler helped transform the concept of a state in the Middle Ages from one where a ruler has access to immediacy as an individual in relation to his people, to one that is distanced from the people through this concept of a ruling office. This same concept of office would be established in all sorts of governmental institutions, as officers⁶⁰ would be employed as the king’s

⁵⁶ Post (n 1) 303.

⁵⁷ Kantorowicz (n 33) 97: ‘What has pleased the prince has the force of law.’

⁵⁸ *ibid* 97: ‘It is worthy of the majesty of the ruler that the prince professes himself to be bound to the law.’

⁵⁹ *ibid* 98.

⁶⁰ Van Caenegem (n 54) 75.

officials rather than, as previously, where the nobility acted as advisers.

It is suggested that a changing state of economic sentiment in the Middle Ages, which led to the devaluation of the feudal system, and, in combination with a development of legal jurisprudence and assertion of political ethics, led to the development of the sovereign state. Henrik Spruyt suggests that it was for this reason that the sovereign state, along with its derivative models of post-feudal governance,⁶¹ emerged and, later, in France according to Spruyt's study, assumed the dominant form of governance.⁶² Spruyt suggests that it was the Capetian dynastic territorial hold that first defined an apparent difference between that kingdom and the past concepts of state; for example, The State of the Holy Roman Empire with its 'claims over a translocal community'.

The Capetians offered an alternative with fixed boundaries and with an unlimited rule that knew no superiors within those boundaries. Spruyt writes that with the Capetians came the introduction of written Roman Law in France and the central administration of royal justice. This, combined with the assertion of fixed territorial boundaries, provides many of the elements necessary for the existence of the modern state – including the exclusion of other kinds of rule within the territory, for example, the Capetians' curtailing of the Pope's and the King of England's powers, notwithstanding the independence of the kingdom of France within the Holy Roman Empire.⁶³

This alternative concept of state rule in France was supported among canonists – where legal (secular) issues were not within their (spiritual) domain. It can therefore be understood that it was important that the church limited the power of the emperor by supporting this concept of legal superiority of the independent state within the empire at a time when relations between the church and the emperor had

⁶¹ The city-state and the city-league.

⁶² Hendrik Spruyt, *The Sovereign State and its Competitors* (Princeton University Press 1994) 77-108.

⁶³ *ibid* 79.

soured. Post comments on the beliefs of Guillaume Durantis⁶⁴ and Charlemagne, whom had never intended that France be under the rule of any emperor – owing to the belief that the king of France recognises no superior. This indicates that the concept of the empire as a State is a very different concept from that of the sovereign state described by Spruyt.

Comparing Apples with Pears

There is no absolute understanding of what the concept of state (or statehood) in the Middle Ages actually meant. In the present time, confusion (even contradiction) exists when trying to discover what it was. In this respect, rather than having any kind of pre-existing notion of what a state was, we can begin to see that it is, rather, a fluid and somewhat artificial concept to use for the Middle Ages.

Furthermore it appears that the concept or notion of state is fully dependent upon the surrounding political and social movements of the era – and of the geographic locality. For example, within the modern concept of the state, Meinecke highlights that the historical importance of the state in Germany had been roused owing to the development of critical thinking and the development and encouragement of political science, notwithstanding the enduring study of philology and theology; particularly those studies of the ‘Göttingen school’ – mainly Lessing and Winckelmann.⁶⁵

In trying to comprehend our past we do so with the attitude of the present. This was also true of the legists of modernity, such as when French legists in search of the origins of a French constitution completely reinterpreted the concept of a late medieval French court of the king – namely the *Lits de Justice*. This was elevated by those le-

⁶⁴ Post (n 1) 468: ‘Guillaume Durantis believe[s] in the legal independence of kings who have no superior, and Guillaume also says that just as no appeal is allowed from the pope or the emperor, so there can be no appeal from a sentence of the French curia, since “the king recognizes no superior in temporals.”’

⁶⁵ Friedrich Meinecke, *Historism: The Rise of a New Historical Outlook* (Routledge and Kegan Paul 1972) 236.

gists and researchers, from a piece of cloth and wooden scaffolding, to an official engagement of constitutional sessions,⁶⁶ indicating that interpretation of the meaning we attempt to deconstruct and examine, appears to be always from a position of subjectivity. Additionally, Roger Collins has indicated that eighth and ninth century historical chronicles were generally written by members of a society that existed outside of the world they had written about. There was a possibility that they could be exaggerating the events in order to bias change on other kingdoms politically. Furthermore, the histories portrayed in these recorded chronicles have been subjected to amendment and fundamental alteration.⁶⁷

I opened this article with a phrase by Gaines Post.⁶⁸ It is one that I feel would be equally apt to close with.

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⁶⁶ Sarah Hanley, *The Lit de Justice of the Kings of France: Constitutional Ideology in Legend, Ritual and Discourse* (Princeton University Press 1983) 14-15.

⁶⁷ Collins (n 30) 287-289.

⁶⁸ Post (n 1) 301: 'The medieval *raison d'état* was no more clearly defined than is the modern one.'

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